United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

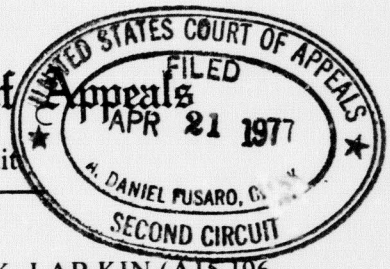
77-6052

To be argued by
THOMAS A. CHURCH

In The

United States Court of Appeals

For The Second Circuit



HUI, YING LAI (A17 540 719) and SHEK, LAP KIN (A15 196 208),

Plaintiffs-Appellants,

vs.

MAURICE F. KILEY, as District Director for the Immigration and Naturalization Service, New York District, United States Department of Justice,

Defendant-Appellee.

B P/S

BRIEF FOR PLAINTIFFS-APPELLANTS

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In The

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HUI, YING LAI (A17 540 719) and SHEK, LAP KIN (A15 196 208),

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vs.

MAURICE F. KILEY, As District Director for the Immigration and Naturalization Service, New York District, United States Department of Justice,

Defendant-Appellee.

BRIEF FOR PLAINTIFFS-APPELLANTS

PRELIMINARY STATEMENT

Plaintiffs below appeal from an adverse decision of Judge Whitman Knapp, United States District Court for the Southern District of New York, 76 Civ. 2890. Judge Knapp's memorandum of law was rendered on March 1, 1977 and final judgment entered on March 14, 1977.

ISSUES PRESENTED FOR REVIEW

1. Whether Chinese applicants for asylum relief are entitled to specific reasons for the denials of their applications as required by regulation.

2. Whether, as Chinese, they are entitled to individual consideration of their applications or should they be considered as a group.

3. Whether it was proper for the Government to make unwarranted and belated allegations that this action is dilatory and frivolous.

STATEMENT OF FACTS

This case involves over eighty (80) Chinese[1] who raise identical issues concerning applications made by them under a relatively new regulation pertaining to asylum.[2] They are all natives and escapees from mainland China. They are all now deportable. As victims and fugitives of the political upheaval which occurred in China in 1949, they are by definition "political refugees." They are all stateless.[3] Therefore, they appear to be prima facie eligible for the requested relief.

Their applications were accepted. They were duly interviewed, and then their applications were denied in identical language:

> "This Service has determined that there is no basis for granting your request and has forwarded your application for an advisory

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1. See the supplemental affidavit of Assistant United States Attorney, Robert S. Groban, of January 27, 1977, para. 9, pp. 6, 7 and the annexed stipulations pertaining thereto (Appendix, 28a-1).

2. 8 C.F.R. 108.

3. This information has been furnished to the Immigration Service in their asylum applications (Form I-589) and during interviews conducted by Service officers (Appendix, 15a-22a). It is consistent with the other information contained in their files.

> opinion to the Department of State. You will be further advised."[4]

No further reasons were given as to these denials by the District Director and no further communication received concerning the matter.

In the complaint it was contended that: (1) the notices of denial given the plaintiffs were inadequate in that they did not meet the requirement of 8 C.F.R. 103.3, in that the applicants were not ". . . given written notice setting forth the specific reasons for such denial . . .", and (2) because of the identical language used, and other factors in their treatment, it was obvious that none of these applications received individual consideration, but were predetermined and treated as a group in a discriminatory fashion.

The original complaint was filed on behalf of two (2) plaintiffs, Ying Lai Hui and Lap Kin Shek, on June 29, 1976.

In 1967, plaintiff Hui was charged with and found deportable as an overstay visitor.[5] Plaintiff Shek was found deportable as a crewman who had been refused permission to land.[6]

Previously, these plaintiffs were among the group of cases which had agreed by stipulation to be bound by the decision of

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4. The plaintiffs' notices of denial appear in the Appendix, pp. 23a,24a. This decision is final. 8 C.F.R. 108.2 provides in part: ". . . The District Director's decision shall be in writing, and no appeal shall lie therefrom . . ."

5. See Exhibits B and C annexed to Mr. Groban's affidavit in support of his motion for summary judgment, November 29, 1976 (Appendix, 10a,13a, 14a).

6. Exhibit AA of Mr. Groban's affidavit of November 29, 1976 (Appendix, 12a).

Chim Ming v. Marks,[7] which was decided several months before 8 C.F.R. 108 became effective as a regulation.[8] The asylum procedure does not require lawful status.

Despite the fact that both plaintiffs had previously applied for asylum before it became a regulation, which applications were also denied without notice or reason, the District Director agreed to accept fresh applications under the new regulations from Chinese aliens only.[9]

The District Director has since conceded, in effect, that the prior procedure as it affected Chinese aliens did not conform to the new regulation.[10]

The plaintiffs further complained that the Service's policy of reaccepting these new applications from "Chinese aliens" was designed to give the appearance of fair consideration in these cases, when in fact, they had been prejudged. They were then notified in an identical manner, without regard to the facts in

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7. 505 F.2d 1170 (2d Cir. 1974). This decision assumed *arguendo,* that the plaintiffs therein were "refugees." This decision is discussed *infra.*

8. The *Ming* case, above, was decided on November 8, 1974; 8 C.F.R. 108 became effective on January 29, 1975.

9. See plaintiffs' complaint (Appendix, 4a).

10. District Director Maurice F. Kiley's affidavit of November 29, 1976 submitted in support of the Government's motion for summary judgment, para. 7, pp. 3, 4, states in part:

> ". . . In addition, to asssure that no injustice resulted from our prior policy, I directed that all Chinese aliens, who had submitted asylum requests under the old procedure, be allowed to submit new ones so that these requests could be reviewed under the requirements of the new regulations in the same manner in which asylum requests made by an alien of any other nationality would be considered. . . ." (Appendix, 25a, 26a).

each case. The District Director has since admitted that he uses a form denial in Chinese cases.[11] The procedure under the new regulation is a mere sham. The District Director seems to have indicated he intends to exercise no discretion whatsoever insofar as Chinese applicants are concerned.

This action consists of three (3) completely different factual situations involving Chinese asylum applicants:

I.

Plaintiff Yin Lai Hui escaped from China in 1951. He lived in Hong Kong until 1954, then made his way to Mexico where he lived until his admission to the United States as a visitor on June 13, 1961. He has remained here since.[12] He brought himself to the attention of the Immigration Service by filing an application for a visa as a cook in October, 1967. During his deportation hearing on December 21, 1967 he testified that he was "against Communism."[13] His lengthy immigration history referred to by Judge Knapp in his opinion below reflected, substantially, his efforts to legalize his status here on the basis of his approved visa petition. It is doubtful that this plaintiff will

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11. Para. 14 at p. 6 of Maurice F. Kiley's affidavit of November 29, 1976, states in part:

> "While the denial may have been made on a form, the increasing number of frivolous applications which I receive necessitates the use of such a form. . . ." (Appendix, 27a).

12. See Hui's affidavit (Appendix, 36a-38a).

13. Exhibit C annexed to Mr. Groban's affidavit in support of his motion for summary judgment at p. 6. The Immigration Judge questioned Hui as to his eligibility for relief under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. §1253(h). This relief is separate and distinct from the relief afforded under the refugee and asylum provisions. See *infra*. In answer to the question whether he would be persecuted in Hong Kong or Mexico, he replied: "I am not afraid to go to either place. I'm only a poor working man, although I am against Communism." (Appendix, 11a).

ever be deported from the United States since the Immigration Service has never been able to obtain a travel document for him.[14]

II.

Plaintiff Lap Kin Shek entered the United States without permission on April 13, 1972. He was found deportable, after hearing on October 10, 1972. He is a native of China who escaped after it became Communist dominated. The Government proposes to deport him to Hong Kong since he had previously lived there. Like the first plaintiff, he was one of the stipulated cases under *Chim Ming v. Marks,*[15] from whom the District Director subsequently agreed to accept a new application as one of the "Chinese aliens" referred to in the District Director's affidavit.[16]

III.

Yao Doy Chun, a relating case (77 Civ. 369), submitted his verified complaint[17] to Judge Knapp and the facts therein argued before him on January 26, 1976, with the consent of the Government.

This plaintiff, fifty (50) years old, is an overstay visitor. He has been here since 1971. The Government asked him to

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14. Hui has received a number of notices to surrender for deportation. To take him into custody without a travel document would be illegal, since his deportation would not be "imminent." *Shrode v. Rowoldt,* 213 F.2d 810 (8th Cir. 1954).

15. *Supra.*

16. *Supra.*

17. Appendix, p. 63a.

surrender for deportation on February 3, 1977 to Taiwan. This plaintiff has never been to Taiwan. In short, the Government proposes to deport him to a country to which he has never been.

After leaving China and staying in Hong Kong for three (3) days he emigrated to Peru. From there he entered the United States as a visitor in 1971. He can no longer return to Peru.

Since his admission to the United States, his daughter, also from China and who had resided in Hong Kong for five (5) years was admitted to the United States as a refugee. She is now a permanent resident by virtue of her refugee status.

Plaintiff, who has one (1) son in Hong Kong, is now living in New York with his only remaining family not in mainland China, *i.e.*, his daughter, son-in-law and his grandchildren.

He was also an asylum applicant. He also received notice that there was "no basis" for his application.

In addition to never having been to Taiwan, he has no family or friends there.

It was contended that in proposing to deport this fifty (50) year old man to Taiwan, the Government would be inflicting an extremely cruel and inhuman hardship on him, tantamount to "persecution." Certainly it does not comport with the "humanitarian principles" to be afforded refugees which is mentioned in the asylum policy.

As indicated, the complaint was filed on June 29, 1976. Since it appeared that one of the plaintiffs was about to be deported, the action included a restraining order which required the personal attention of the assigned District Court judge. The Government declined to oppose the order, agreeing that the issues raised were novel, and further, agreed to stipulate stays in the plaintiffs' cases pending a final determination of the matter

by the District Court. Since, then, over eighty(80) cases have been so stipulated, *i.e.*, those who had received identical notices of denial. It is believed that the Government has consented to stipulate other cases where the same issues were raised.[18]

On November 29, 1976, five months after the original complaint was filed, the Government responded for the first time by filing a motion for summary judgment, alleging among other things, for the first time, that the plaintiffs' action was "dilatory and frivolous," while stating in its supporting brief that:

> ". . . Because 8 C.F.R. 108 was promulgated so recently, there is to our knowledge no case law discussing its provisions or its history."[19]

While the Government's motion for summary judgment substantially conceded that the plaintiffs' allegations were true, the supporting papers were extremely voluminous.[20] Most of the material was non-responsive, much of it was redundant and not relevant to the simple issues raised. Then too, considering the belated accusation of "dilatory and frivolous" the plaintiffs countered that the Government, rather than directly confront the issues, was attempting (1) to color and prejudice the cases, and (2) confuse the court.[21]

The Honorable Whitman Knapp heard oral argument on

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18. Mr. Groban's affidavit of January 27, 1977, p. 6 (Appendix, 28a-1).

19. Defendant's memorandum of law in support of a motion for summary judgment at p. 9 (No. 4 of the docketed record).

20. District Court Rule 9(g) provides for a "concise" statement; the Government's Rule 9(g) statement consisted of 32 paragraphs. The supporting affidavits consisted of twenty-four (24) pages, with over one hundred (100) pages of exhibits. A twenty-two page brief was also submitted.

21. Affidavit of plaintiffs' attorney in opposition to motion for summary judgment, page 2 (Appendix, 29a).

the matter on January 28, 1977. At that time it was demonstrated to the Court, with the Government's consent, that the Government proposed to deport one of the related cases, a fifty (50) year old man, to Taiwan, a country to which he had never been.[22]

On March 1, 1977, Judge Knapp rendered a memorandum granting the Government's motion for summary judgment and denying the Government's application for costs and fees.[23] Judgment was entered on March 15, 1977.

On March 15, 1977, Judge Knapp denied plaintiffs' request for a stay pending an appeal.[24] Notice of appeal was filed March 15, 1977.

On March 17, 1977, the plaintiffs applied to this Court for a stay pending appeal.[25] On March 29, 1977 the Government consented to the requested stay.

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22. *Supra.*

23. Appendix, pp. 42a-50a.

24. Appendix, pp. 52a-54a.

25. Appendix, pp. 52a-54a.

ARGUMENT

I.

The District Director violated the regulations of the Immigration and Naturalization Service by failing to provide Chinese asylum applicants with specific reasons for the denials of their applications.

Judge Knapp erred in his memorandum when he stated that asylum relief was "originally promulgated as an operating instruction" (at page 5 of the memorandum). The policy and procedures of asylum were first promulgated by a State Department Public Notice dated January 4, 1972, published in the Federal Register.[26] Operations Instructions are unpublished internal instructions to Service officers which are subject to revision and change without notice on a day to day basis.

What makes this error so blatant is that Judge Knapp then proceeded to ascribe to the asylum policy language of the unpublished operation instructions which does not appear in the published State Department Notice of 1972.[27].

Since the operations instructions are subject to change without notice on a day to day basis and no one can tell what the policy or procedure might be at any given point in time, it is doubtful that these instructions are either binding on the Service or reviewable by the courts.[28]

However, once the asylum procedure achieved the dignity

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26. State Dept. Public Notice 351, 37 F.R. 3447 (1972). The origin of asylum relief is discussed in *Immigration Law & Procedure*, Gordon & Rosenfield, Sec. 2.3i, p. 2-24.2.

27. This aspect is again discussed *infra* at Point III.

28. *American President Lines v. Fed. Maritime Comm.*, 316 F.2d 419 (C.A.D.C. 1963); *Gibson Wine Co. v. Snyder*, 194 F.2d 329 (C.A.D.C. 1952);

of a regulation it thereby became a part of the general body of the immigration law, as though it were a "statute", and is now properly subject to judicial review.[29]

On January 29, 1975, after publication,[30] 8 C.F.R. 108 became effective as a regulation. It is a cardinal principle of administrative law that agencies are bound by their own regulations.[31]

When, after the asylum procedure became a regulation, and the District Director agreed to accept second applications from "Chinese aliens" he was then obliged to handle these applications in accordance with the pertinent regulations of the Immigration Service. This is true even though his action in accepting the new applications was unnecessary and gratuitous.[32]

In notifying the eighty (80) Chinese applicants that "This Service has determined that there is no basis for granting your request . . ." the District Director did not comply with 8 C.F.R. 103.3 which requires that such applicants are entitled to ". . . written notice setting forth the specific reasons for such denial."

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29. Davis, *Administrative Law Treatise*, (1970 Supp.), Sec. 503.

30. 39 F.R. 41832 (December 3, 1974).

31. *Service v. Dulles*, 354 U.S. 363 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969); *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968); *United States v. Nixon*, 418 U.S. 683 (1974).

32. *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

II.

The District Director in admittedly handling Chinese asylum applicants as a group had obviously predetermined their applications in a discriminatory fashion.

Since the initiation of this action the District Director has conceded that the applications filed by Chinese aliens received special treatment. In his affidavit submitted in support of the Government's motion for summary judgment, he stated:

> ". . . In addition, to assure that no injustice resulted from our prior policy, I directed that all Chinese aliens, who had submitted asylum requests under the old procedure, be allowed to submit new ones so that these requests could be reviewed under the requirements of the new regulations in the same manner in which asylum requests made by an alien of any other nationality would be considered. . . ."[33]

In an effort to show individual consideration the District Director outlined in his affidavit a four step, *pro forma,* intra-agency procedure which he claims is now followed by the Service under the new regulations.[34] Much of the material connected therewith was not readily available to the plaintiffs at the time of the denials.

Further, it is not sufficient justification for using a form denial that there were an "increasing number of frivolous applications which . . . necessitates the use of such a form. "[35]

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33. Para. 7, pp. 3, 4, of Maurice F. Kiley's affidavit of November 29, 1976 (Appendix, 25a, 26a, 27a).

34. *Ibid.*

35. *Ibid.* Para. 14 at p. 6 (Appendix, 27a).

This merely confirms the conclusion that the applications had already been labeled "frivolous" and were prejudged at the time the District Director accepted them again. This procedure is clearly a denial of due process.[36]

It has long been held that where a regulatory provision, fair on its face, is administered in an uneven and discriminatory manner, there is a deprivation of the equal protection of the laws guarantee of the Constitution. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). The *Yick Wo* case was recently cited and followed in an immigration case by this Court. *Francis v. INS,* 532 F.2d 268 (2d Cir. 1976).[37]

The matter becomes especially disconcerting when the publicity given to asylum relief makes it apparent as to just how unevenly the relief is applied.[38]

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36. *See, Accardi v. Shaughnessy,* 347 U.S. 260 (1954); *Mastrapasqua v. Shaughnessy,* 180 F.2d 999 (2d Cir. 1950).

37. The Court stated:

> ". . .distinctions between different classes of persons must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (Cites cases at page 272.)

38. The record contains newspaper clippings concerning a well known Czechoslovakian tennis star who was afforded asylum relief although she was free to travel, had no political convictions of any kind, and whose income was extremely large. She requested the relief because she wanted to improve her game. (The clippings were submitted to the Service in connection with Hui's application. Annexed to Item No. 12 of the docketed record.)

III.

As political refugees the plaintiffs appear to be eligible for asylum relief; the third country concept as distinguished from Section 243(h) relief.

Contrary to Judge Knapp's memorandum below, asylum was *not* "originally promulgated as an operating instruction."[39] the policy and procedures of asylum were first promulgated by a State Department Public Notice dated January 4, 1972 published in the Federal Register.[40] It provided, among other things, that foreign nationals within the United States and abroad "should be given full opportunity to have their requests considered on their merits. Because of the wide variety of circumstances which may be involved, each request must be dealt with on an *individual basis,* taking into account *humanitarian principles, applicable laws* and other factors." (Emphasis supplied.)[41]

The notice also provided that "a basic objective of the United States is to promote institutional and individual freedom and *humanitarian concern for the treatment of the individual,* through the implementation of generous policies of asylum and assistance for *political refugees,* the United States provides leadership toward resolving refugee problems." (Emphasis supplied.)[42]

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39. At page 5 of the Court's memorandum (Appendix, 46a).

Note: The Immigration Service's Operations Instructions are internal instructions to Service officers. They are a looseleaf affair subject to revision and change, without notice, on a day to day basis.

40. State Dept. Public Notice 351, 37 F.R. 3447 (1972).

41. *Ibid.* Part I, Policy.

42. *Ibid.*

As stateless victims of the political upheaval that occurred in China in 1949, who since that time fled that country, there is no doubt but that the plaintiffs are "political refugees." The Government has consistently conceded, for purposes of litigation that such Chinese are "refugees."[43]

The "applicable law" with respect to refugees in the immigration statute which existed at the time of the State Department's Public Notice, was contained in Section 203(a)(7) of the Immigration and Nationality Act, 8 U.S.C. §1153. Since 1970 when Hong Kong was added to the list of designated refugee centers,[44] thousands of Chinese refugees, such as these plaintiffs, have been admitted to the United States as conditional entrants under Section 203(a)(7).

The problem arises, not as to whether they are refugees by definition, but as to the circumstances under which relief may be applied. Are the applicants required to make a showing that they would be persecuted in the country to which they would be deported, as is required under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. §1253(h)? The latter provision authorizes the Attorney General "to withhold deportation of any alien within the United States *to any country which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion.*

The relief afforded refugees under Section 203(a)(7) is completely separate and distinct from that relief contained in Section 243(h).[45] Section 203(a)(7) requires that a refugee who

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43. *E.g.*, Plaintiffs had previously agreed to be bound by the determination in *Ming v. Marks*, 505 F.2d 1170 (2d Cir. 1974), which assumed *arguendo* the plaintiffs were refugees. Discussed *infra* with other cases.

44. By regulatory amendment to 8 C.F.R. 235.9 (35 F.R. 17322, 1970).

45. The distinction is recognized by the Board of Immigration Appeals. *See, Matter of Tan*, 12 I. & N. Dec. 564 (1967); and *Matter of Janus and Janek*, 12 I. & N. Dec. 866 (1968).

fled any Communist dominated country must file his application in "any non-Communist or non-Communist dominated country," *i.e.*, a third country.

But what does the Department of State's Public Notice say concerning those refugees living in a third country? It states, in part:

> "V. C. *Coordination with host country authorities.* Action with regard to *third country* nationals seeking asylum should normally be taken within the overall policy that *the granting of asylum is the right and responsibility of the government of the country in whose territory the request is made.*"[46] (Emphasis supplied.)

The Department of State's Public Notice 351 further states: "A primary consideration in U.S. asylum policy is the Protocol Relating to the Status of Refugees to which the United States is a party."[47]

The definition of refugee under the Protocol[48] also contemplated third country situations, as including those persons ". . . who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is *unable* or, owing to such fear, is unwilling to return to it."[49] (Emphasis supplied.)

Therefore, when the Government urges that the plaintiffs failed to allege a fear of persecution should they be deported to

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46. Public Notice 351, *supra*, at Part V-C.

47. *Ibid.* I. *Background.*

48. 19 U.S.T. 6223, T.I.A.S. No. 6577.

49. Article 1(A)(2).

Hong Kong during their deportation hearings, as it might affect their asylum application, the Government is confusing the standard invoked under Section 243(h) with the refugee provisions, referred to above.[50]

The plaintiffs did not request the District Court to substitute its judgment for that of the District Director. They merely requested that the District Director exercise *some* judgment. The gravamen of the complaint was directed at procedural failures.

The asylum procedures *are* vague. The District Director has done nothing to clarify the situation except to submit his after the fact affidavit and operating instructions which are subject to revision without notice. There is no way of telling what the situation was at the time the various applications were filed.

The District Director, in his affidavit supporting the motion for summary judgment, explained that he used the "no basis" form because ". . . no additional reason could be set forth to further explain my decision."[51] It is contended that the plaintiffs are by definition "refugees" and are prima facie eligible for asylum relief, depending on the facts in each case.[52] There *is*

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50. It is to be noted that plaintiff Hui testified at his deportation hearing in 1967 that while he was not afraid to go to Mexico or Hong Kong, he was "against Communism." (Page 6 of the transcript of his hearing. This occurred five (5) years before asylum. Appendix, 11a).

51. Maurice F. Kiley's affidavit of November 29, 1976, para. 14 at p. 6.

52. This case consists of three (3) different fact situations:

(i) *Plaintiff Hui*, an overstay visitor, who lived in Hong Kong for three years and has not been there in twenty-three years. The Government appears unable to deport him since they have not obtained a travel document for him in ten (10) years;

(ii) *Plaintiff Shek*, a deserting crewman from Hong Kong;

(Cont'd)

some basis for a fair consideration of their applications. At least they are entitled to know why their applications were denied.

IV.

Equating Section 243(h) relief with the asylum and refugee provisions could immunize the District Director from judicial review, and possibly influence the Court's jurisdiction.

The substantive distinctions between Section 243(h) relief and the asylum and relief provisions were discussed in Point III, *supra.* However, if the same standards were applied to both Section 243(h) and the asylum provisions, certain problems could arise as to the availability of review of the District Director's actions. If an alien were to run the gamut of the entire regulation, *i.e.*, by first applying for asylum and in the event of denial by the District Director, then make an application by motion for Section 243(h) relief before an Immigration Judge, the latter procedure would be considered a "242(b)" proceeding and ultimately reviewable by this Court under Section 106(a) of the Immigration and Nationality Act, 8 U S.C. §1105(a), after a determination by the Board of Immigration Appeals. Assume that the alien then asked for a review of the entire proceedings under the regulation, *i.e.*, both as to asylum and Section 243(h). Under such circumstances the Government urges that the Court of Appeals' jurisdiction is confined to a review of only the Section 243(h) determination and that this Court has no jurisdiction to review the determination of asylum made by the

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(Cont'd)

(iii) *Yao Doy Chun*, a 50 year old overstay visitor that the Government proposes to deport to Taiwan, a country to which he has never been.

All three are stateless and fugitives from China. Complete factual statements appear *supra*. All three(3), especially *Hui* and *Chun* appear to be refugees under *all* of the definitions of "refugee" as they existed when asylum was first promulgated in 1972.

District Director. This is consistent with the law in this circuit.[53] However, in the instant case, an action for declaratory judgment filed in the District Court, the Government argued ". . . the due process protections normally applicable to aliens in this country do not apply to 8 C.F.R. 108 because of the procedural safeguards contained in Section 243(h) of the Act.[54] If this reasoning were to be adopted then the exercise of the District Director's discretion as to asylum would be nonreviewable both in this Court and the District Court.

That Judge Knapp adopted, to some degree, the Government's reasoning is evidenced in his memorandum where he states:

> ". . .In fact, the government informs the court that, even now, the plaintiffs are entitled to a full hearing under Immigration Act sec. 243(h) if they produce any evidence of persecution."[55]

If the Government's reasoning became precedent the Government could successfully dodge jurisdiction in both courts in this and similar situations.

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53. This situation was discussed in *Tai Mui v. Esperdy*, 371 F.2d 772 (2d Cir. 1966) at 776-778.

54. Defendant's Memorandum of Law, p. 13 (Item No. 4, docketed record).

55. At page 8 (Appendix, 59a).

V.

Prior litigation indicates that although the Immigration and Naturalization Service is willing to concede that Chinese plaintiffs, *arguendo*, are by definition "refugees", the service is reluctant to directly confront the problem of Chinese refugees.

When the Immigration and Nationality Act of 1952 was amended by the current Act of October 3, 1965, it contained a "seventh preference" which provided for the conditional entry of refugees. Section 203(a)(7) of the Immigration and Nationality Act, 8 U.S.C. §1153(a)(7).

This provision has been the subject of considerable litigation involving Hong Kong Chinese, usually crewmen who deserted their vessels. The Government has never seriously denied that these Chinese are by definition "refugees."

An earlier decision was *Tai Mui v. Esperdy,* 371 F.2d 772 (2d Cir. 1966). It advanced two (2) significant propositions: (1) that the Hong Kong Chinese crewmen plaintiffs in the United States, concededly refugees under Section 203(a)(7), *supra,* could not adjust their status to lawful permanent residence because the adjusting provision (Sec. 245 of the Immigration and Nationality Act, 8 U.S.C. §1255) specifically excluded crewmen (pp. 773 to 780 of the opinion), and (2) it had been contended by the plaintiffs that as refugees they had no place where they could make application. Seven countries at that time had been designated by the Attorney General to receive refugee applications: Austria, Belgium, France, Germany, Greece, Italy and Lebanon. Hong Kong had not been so designated. The Court held that this was not a judicially reviewable problem since, to compel the Attorney General to designate Hong Kong as a refugee center, would be an improper interference with the executive branch.

The above situation was subsequently ameliorated by virtue

of an amendment to 8 C.F.R. 235.9 published on November 11, 1970, (35 Federal Register 17322) by which Hong Kong was added to those countries where refugee applications could be received.

8 C.F.R. 235.9 is still in effect. Since 1970 thousands of persons from mainland China, who have lived for various periods of time in Hong Kong, such as the instant plaintiffs here, have emigrated from Hong Kong to the United States as refugees.

In a more recent case, to which two (2) of these three (3) aliens were bound by stipulations, *Chim Ming v. Marks,* 505 F.2d 1170 (2d Cir. 1974), it was contended that the Protocol (Treaty) Relating to Refugees,[56] to which the United States was a signatory, protected the Hong Kong crewmen-plaintiffs by virtue of Article 32:

> "*Expulsion*
>
> 1. The Contracting States shall not expel a refugee *lawfully* in their territory save on grounds of national security or public order." (Emphasis supplied.)

The Court assumed, *arguendo,* that the plaintiffs were refugees. The Court held that the plaintiffs were not "lawfully" within the United States, and therefore were not eligible for the protection afforded by the terms of the Protocol. The Court also held that although the alien might be barred from seeking protection under Article 32 ". . . does not prevent him from obtaining relief under available provisions of our immigration laws, including not only Section 243(h) but also 203(a)(7) of the Act. 8 U.S.C. 1153(a)(7), referring to conditional entries." This case was decided on November 8, 1974.

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56. 19 U.S.T. 6252, T.I.A.S. No. 6577.

Two months later, on January 29, 1975, 8 C.F.R. 108 became effective. The relief afforded by this regulation does not require the lawful status[57] referred to in the *Ming* case, *supra*. It was shortly thereafter that the District Director agreed to accept new applications from the Chinese. The factual basis for this suit then ensued.[57]

VI.

It was improper for the Government to make unwarranted and belated allegations that this action is dilatory and frivolous.

It is to be expected that the courts rely on the expertise of the Government in administrative matters, what with the changing statutes, regulations, and policy. The Government must also recognize this fact. There are certain aspects of this case which are disturbing and indicate that the Government may be abusing its responsibility in this case.

As part of the Government's motion for summary judgment the Government requested Judge Knapp to assess court costs

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57. At the time this action was commenced there were no cases on the subject. Recently, two (2) cases were decided on asylum: *Sannon and Kettey v. United States*, Case Nos. 74-428 and 75-2124 (U.S.D.C. S.D. Fla., decided February 15, 1977); and *Pierre, et al. v. United States*, Docket No. 75-3975 (U.S.C.A. 5th Cir., decided March 7, 1977).

A copy of the *Sannon* opinion was submitted to Judge Knapp on February 28, 1977. The accompanying letter pointed out that the case was not on all fours with the instant case but illustrated the extreme reluctance of the Government to confront the asylum issue. (The Government had failed to give plaintiffs a hearing after representing to the Court that it would do so.) Judge Knapp did not consider the decision since it was "not timely."

Neither case is in point with the instant case, since neither raise the same issues. Both of the Florida cases involve exclusion hearings, clearly distinguishable from a deportation proceeding, in that the former affords no constitutional protection.

against the plaintiffs because the action was "dilatory and frivolous," citing as authority, *Acevedo v. INS*, 538 F.2d 918 (2d Cir. 1976).

The Government must know that the *Acevedo* case is not applicable here. *Acevedo* involved a baseless petition for review filed with the Court of Appeals under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. §1105(a), which section provides for an automatic stay of deportation of the alien when the petition is filed, without the necessity of appearing before a judge, "pending a determination of the petition by the court."

The instant case, a declaratory judgment action, was filed in the District Court on June 29, 1976. It contained a restraining order which requires the personal appearance of both counsel before the assigned District Court judge.[58] The United States Attorney had an opportunity at that point to oppose the order as being without merit. The Government declined to do so however, but agreed to stipulate as to stays for the two (2) plaintiffs, pending a final determination of the Court,[59] since the issues presented were "novel." Since that time the Government has agreed to stipulate with several attorneys over eighty (80) cases posing identical issues.[60] Traditionally, the U.S. Attorney's office would never agree to stipulate immigration cases that it felt were without merit.

The Federal Rules of Civil Procedure, Rule 12, allows the Government sixty (60) days to answer after the summons and

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58. Judge Knapp's procedure, as it appears in the New York Law Journal: "If a TRO is requested, counsel must insure that their adversaries are present for the signing of any order."

59. Appendix, p. 55a.

60. Special Assistant Groban's affidavit of January 27, 1977 (Appendix, 28a-1).

complaint have been served on the U.S. Attorney. In this case the Government did not reply until November 29, 1976, five months after service. It was then, for the first time that the Government claimed that the action was "dilatory and frivolous." However, the Government stated in its memorandum of law: ". . . Because 8 C.F.R. was promulgated so recently, there is to our knowledge no case law discussing its provisions or its history."[61]

Judge Knapp in his memorandum and order denied the Government's request for court costs.

Judge Knapp then denied an application for a stay pending appeal. Subsequently, an application for a stay was made before this Court.[62] The Government consented to the stay.

This issue is raised, because, not only is it personally demeaning to the attorney involved since it challenges his competence and sincerity, but it is unfair to other attorneys as well since it might inhibit them in the proper conduct of their cases. The threat of such a charge, even when baseless, might deny to prospective plaintiffs free access to the courts. Such a charge used as a tactic is prejudicial since it could divert the Court's attention from the real issues involved.

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61. At page 9 (Item No. 4, docketed record).

62. Appendix, Affidavit, pp. 52a-54a.

CONCLUSION

The decision of the United States District Court should be reversed and this case remanded to the Immigration Service so that a more proper consideration be given their applications.

Respectfully submitted,

s/ Thomas A. Church
Attorney for Plaintiffs-Appellants

RELEVANT STATUTES AND REGULATIONS

8 C.F.R. 108 — Asylum

§108.1 *Application.* An application for asylum by an alien who is seeking admission to the United States at a land border port of pre clearance station shall be referred to the nearest American consul. An application for Asylum by any other alien who is within the United States or who is applying for admission to the United States at an airport or seaport of entry shall be submitted on Form I-589 to the district director having jurisdiction over his place of residence in the United States or over the port of entry. The applicant's accompanying spouse and unmarried children under the age of 18 years may be included in the application.

§108.2 *Decision.* The applicant shall appear in person before an immigration officer prior to adjudication of the application, except that the personal appearance of any children included in the application may be waived by the district director. The district director shall request the views of the Department of State before making his decision unless in his opinion the application is clearly meritorious or clearly lacking in substance. The district director may approve or deny the application in the exercise of discretion. The district director's decision shall be in writing, and no appeal shall lie therefrom. If an application is denied for the reason that it is clearly lacking in substance, notification shall be given to the Department of State, with opportunity to supply a statement containing matter favorable to the application, and departure shall not be enforced until 30 days following the date of notification unless a reply has been received from the Department of State prior to that time. A case shall be certified to the regional commissioner for final decision, if the Department of State has made a favorable statement, but, notwithstanding, the district director has chosen to deny the application. If any decision will be based in whole or in part upon a statement furnished by the Department of State,

the statement shall be made a part of the record of proceeding, and the applicant shall have an opportunity for inspection, explanation, and rebuttal thereof as prescribed in §103.2(b)(2) of this chapter. A denial under this part shall not preclude the alien, in a subsequent expulsion hearing, from applying for the benefits of section 243(h) of the Act and of Articles 32 and 33 of the Convention Relating to the Status of Refugees.

(Sec. 103; 66 Stat. 173 (8 U.S.C. §1103).)

8 C.F.R. 103.3

§103.3 *Denials, appeals and precedent decisions.*

> "Whenever a formal application or petition filed under Section 103.2 is denied the applicant shall be given written notice setting forth the specific reasons for such denial. . . ."

Section 203(a)(7) of the Immigration and Nationality Act; 8 U.S.C. §1153(a)(7)

Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area.

Section 243(h) of the Immigration and Nationality Act; 8 U.S.C. §1253(h)

The Attorney General is authorized to withhold deportation

of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

Department of State (Public Notice 351)

(Published: 37 F.R. 3447; February 16, 1972)

REQUESTS FOR ASYLUM

Policy and Procedure

The following procedures were transmitted by memorandum of January 7, 1972, to all U.S. Governments and agencies. Copies were also sent to all American diplomatic and consular posts instructing them to coordinate implementation by U.S. Government units within the areas of their jurisdiction.

"Dated: February 1, 1972.

(SEAL)

William P. Rogers,
Secretary of State
January 4, 1972.

Part I — General Policy for Dealing With Requests for Asylum by Foreign Nationals.

Policy. Both within the United States and abroad, foreign nationals who request asylum of the U.S. Government owing to persecution or fear of persecution should be given full opportunity to have their requests considered on their merits. The request of a person for asylum or temporary refuge shall not be arbitrarily or summarily refused by U.S. personnel. Because of

the wide variety of circumstances which may be involved, each request must be dealt with on an individual basis, taking into account humanitarian principles, applicable laws and other factors."

". . . *U.S. Objectives.* A basic objective of the United States is to promote institutional and individual freedom and humanitarian concern for the treatment of the individual.

Through the implementation of generous policies of asylum and assistance for political refugees, the United States provides leadership toward resolving refugee problems.

Background. A primary consideration in U.S. asylum policy is the "Protocol Relating to the Status of Refugees," to which the United States is a party. . . ."

". . . *V.C. Coordination with host country authorities.* Action with regard to third country nationals seeking asylum should normally be taken within the overall policy that the granting of asylum is the right and responsibility of the government of the country in whose territory the request is made."

Definition of Refugee Under Protocol Relating to the Status of Refugees

ARTICLE 1 of the TREATY

Definition of the Term "Refuge"

"A. (1) . . . and (2) . . . owing to well-founded

fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."